IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

YAKPAWOLO S SAH Claimant **WAL-MART STORES INC** Employer	**APPEAL 15A-UI-06948-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/24/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 15, 2015, (reference 01) unemployment insurance decision that denied benefits based on misconduct. The parties were properly notified about the hearing. A telephone hearing was held on July 21, 2015. Claimant participated. Employer participated through Assistant Store Manager Beth Cochran and Personnel Coordinator Erin Speaker.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an unloader from October 3, 2014, and was separated from employment on May 15, 2015, when he was terminated.

Employer's attendance policy involves progressive discipline. After three absences an employee is counseled. After four absences, an employee is given a first level warning. After five absences, an employee is given a second level warning. After six absences, an employee is given a third level warning. After seven absences, an employee is terminated. Tardies are considered absences.

Claimant was tardy on numerous occasions due to issues with childcare. He had received three warnings in accordance with employer's attendance policy. Manager Scott Bender was trying to work with claimant, so employer allowed him to accrue 18 absences without terminating his employment. On April 24, 2015, Bender told claimant that he was a good employee and he did not want to lose him. Bender did not warn claimant that continued tardiness due to childcare issues would result in termination.

On May 1, 2015, Bender went on vacation and never returned.

On May 13, 2015, claimant called employer and stated he was going to be late because his babysitter was unavailable. Claimant was scheduled to work at 4:00 p.m., but did not come to work until 9:00 p.m. On May 15, 2015, manager Cody Bigelow terminated claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct **except for illness or other reasonable grounds** for which the employee was absent and that were properly reported to the employer. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law." The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate

notice." *Cosper* at 10. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

In this case, claimant was warned about his conduct. However, employer's conduct rendered its attendance policy and corresponding warnings meaningless. Employer allowed claimant to accrue 18 absences in blatant violation of its attendance policy and continued his employment. Bender told claimant he was a valued employee and was willing to work with claimant regarding his childcare issues. Claimant did not have fair warning his conduct would result in termination.

Respondent has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The June 15, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Christine A. Louis
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Decision Dated and Mailed

cal/pjs